No. 95-185

In The

Supreme Court of the United States

October Term, 1995

CHRISTOPHER FLORIO, et al.,

Petitioners,

vs.

GARY SKOREPA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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TO THE HONORABLE SUPREME COURT:

Respondents respectfully request that this Court deny the Petition for Writ of Certiorari submitted by the petitioners.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY OF THE CASE

Petitioners' Statement of the Case is inaccurate. Petitioners filed their Complaint in this action on February 14, 1991. The Complaint requested declaratory, injunctive, and monetary relief pursuant to 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the United States Constitution. Count I of the Complaint alleged that the respondents – the City of North Royalton ("City" or "North Royalton") and its Mayor, Gary Skorepa ("Skorepa"), in his individual and official capacities – violated the First Amendment rights of petitioner Christopher Florio ("Florio") by discharging him from his employment with the Service Department of the City. Counts II and III of the Complaint alleged state claims of wrongful discharge and intentional and negligent infliction of emotional distress. Count IV of the Complaint was brought by Florio's wife, petitioner Sharon Florio; that count appeared to allege a state claim of emotional distress or loss of consortium.

On March 25, 1991, respondent Skorepa, in his individual capacity, filed a motion to dismiss on the basis of federal qualified immunity. The District Court denied said qualified immunity motion, and Skorepa took an interlocutory appeal. On May 12, 1992, the Sixth Circuit

Court of Appeals affirmed in part and reversed in part. (Appendix "B" to Petition for Writ of Certiorari). The panel held that "Florio's speech relating to threats by his department head was directed at issues outside the concern of the public . . . . " (*Id.* at 5). Accordingly, the Sixth Circuit reversed the denial of qualified immunity as to that portion of Florio's speech. (*Id.*). However, the Sixth Circuit affirmed the denial of the qualified immunity motion to dismiss insofar as Florio's speech alleging misspending and inefficiency was concerned. The panel held that this portion of Florio's speech might be actionable if said speech implied that an agency or official was corrupt, since "[p]ublic corruption is a matter of public interest and warrants constitutional protection." (*Id.*). The Court was "unable to discern whether Florio's speech can be read as an allegation of public corruption or whether Florio merely sought the correction of work-related concerns in a public forum. The resolution of this uncertainty is necessary in order to determine whether his speech is a matter of public concern and deserving of constitutional protection." (*Id.*). Therefore, the Sixth Circuit affirmed that portion of the denial of the qualified immunity motion to dismiss that involved Florio's allegations of misspending and inefficiency. (*Id.*).

After remand, respondents North Royalton and Skorepa filed a motion for summary judgment, which included a motion by Skorepa in his individual capacity for summary judgment on the basis of qualified immunity. Petitioners also filed a motion for summary judgment. In a Memorandum of Opinion and Order, filed September 27, 1993, the District Court granted respondents' motion for summary judgment on the federal

claims and dismissed petitioners' state claims without prejudice. (Appendix "A" to Petition for Writ of Certiorari). Petitioners appealed, and on May 30, 1995, the Sixth Circuit Court of Appeals affirmed the grant of summary judgment to respondents. (Appendix "C" to Petition for Writ of Certiorari). In their Petition for Writ of Certiorari, the petitioners request that this Court review the May 30, 1995 Sixth Circuit decision.

B. STATEMENT OF THE FACTS

The facts set forth in this brief are supported by the evidence of record submitted with the motions for summary judgment in the District Court.

In August of 1987 Florio commenced his employment with the City of North Royalton as a Laborer I in the Service Department. In 1988 Jack Darby ("Darby") was appointed as the first Director of the Service Department. The Service Department was and continued to be understaffed, having no more than thirty workers for a city of 24,000 people. During his first few months as Service Director, Darby spent much of his time developing the City's first strategic plan to use its employees in the most efficient manner possible and to prepare for its public works and maintenance programs.

When Darby became Service Director, the department had an employee named Carl Prahl ("Prahl"), who functioned at that time as a Working Foreman. However, Prahl became quite ill in 1989, missed a great deal of work, and eventually passed away. Therefore, Darby assigned William "Skip" Mayer ("Mayer"), who was then a Laborer III, the tasks of a Working Foreman. Mayer had

previous experience filling in for Prahl and the former General Foreman, and Mayer was an excellent worker. Mayer had extensive duties and was essentially in charge of the day-to-day operations of the department. He prepared work orders, made job assignments, supervised work crews, oversaw jobs in progress, and ensured that equipment and supplies, such as stone, paving materials, pipe, and the like, were available as needed. Mayer also assisted Darby in planning and executing the department's strategic plans for flood control, snow removal, and the like. Darby did not consider Mayer's duties to be "secretarial" in nature.

Mayer's predecessor, Prahl, had been assigned a service department truck, though he did not take the truck home. Ed Swim, a Working Foreman at the cemetery, was not on 24 hour call. However, Swim was already assigned a City vehicle and allowed to take it home. Mayer was on 24 hour call. When the Service Department was given an old police cruiser, Darby arranged for Mayer to be assigned the car, as the department was short on trucks. Mayer frequently drove to different job sites throughout the day to monitor and supervise work, and solve various problems. Often, Mayer stopped by one or more sites in the evening before going home. Consequently, to ensure that Mayer would be on time and have transportation in an emergency, and consistent with the precedent of Ed Swim, Mayer was allowed to take the car home.

As a result of Mayer's extensive duties, his appearance at emergencies, his response to calls at various hours, and his assistance in clearing up a backlog of work and help in planning, Mayer earned a significant amount of overtime. It was Darby's understanding that the union

wanted overtime to be equally distributed to all its members. In addition, the union was concerned that someone performing managerial tasks was included in the bargaining unit. However, the City's citizens benefited immensely from having a "Working Foreman". Accordingly, the City and the union negotiated over this position. The next union contract provided for the position of "Working Foreman", outside the bargaining unit.

Darby's treatment of Mayer was motivated by a desire to have the department's work performed as effectively as possible and not by a desire to play favorites or allow anyone to benefit unfairly. Although Florio sometimes saw Mayer working at a desk, Florio admitted at his deposition that he did not know Mayer's job functions. Florio also does not know why the City was paying Mayer what they were paying him, why the City was allowing Mayer to drive the City car, and why the City was allowing Mayer to get overtime. Florio testified that "I never even thought about it being illegal or not." Florio has no evidence that anything relating to Mayer involved any kind of kickbacks or similar improper private gain, and Florio has "no idea" whether any such illegal conduct occurred.

Notwithstanding his admitted lack of opinion, knowledge, and evidence regarding unlawful or corrupt activity, Florio complained at the September 18, 1989 City Council meeting about Mayer's situation because Florio (according to his own deposition testimony) believed such treatment involved a "misspending" of public money. Petitioners characterize this Council meeting as a "town meeting"; however, North Royalton has a typical Midwestern Mayor-Council form of government, not a

New England "town meeting" system in which the citizens vote directly on legislation. Moreover, the period of the Council characterized by petitioners as the "free speech" period is merely the portion of the meeting in which North Royalton residents are allowed to express their views on various topics. Petitioners' repeated use of the terms "town meeting" and "free speech" period evokes a participatory democracy style of government that may exist in some New England communities as distinguished from the representative form of government existing in North Royalton and most Midwestern communities.

Mayor Skorepa initiated disciplinary proceedings against Florio because Skorepa believed Florio's comments at the Council meeting disclosed confidential matters that were the subject of discussions with the union. The issues pertaining to Mayer were the subject of a grievance, and it had been agreed in an executive session in the Mayor's office, which Florio attended, that those issues would be included in forthcoming formal collective bargaining negotiations. Although Florio was not part of the negotiating team, Skorepa testified that "he was part of the grievance procedure" and "[b]y his position or presence he was privy to that in the office at the time that this took place." It was understood that such discussions are confidential.

The disciplinary process that Skorepa initiated resulted in a ruling by the arbitrator that Florio should be reinstated to his position. However, the arbitrator denied back pay to Florio because he found that Florio's comments at the Council meeting constituted egregious conduct. Accordingly, the instant case is not about

reinstatement of Florio to his position – that has already been accomplished and Florio remains a North Royalton employee – but rather about the labor arbitrator's seasoned judgment that Florio was not entitled to back pay because Florio flagrantly disregarded collective bargaining protocol by discussing at a City Council meeting matters that were the subject of pending union grievances.

The fact that the subject of Florio's speech was inextricably connected with collective bargaining matters is indicated by petitioners' statement that "[e]ach of Florio's revelations concerning waste and mismanagement was subsequently corrected by Mayor Skorepa." (Petition for Writ of Certiorari at 3 n.2). What petitioners fail to mention is that the matters of which Florio complained at the Council meeting had been the subject of discussions, attended by Florio, wherein these grievances were scheduled for inclusion in the forthcoming collective bargaining negotiations. Any changes for which Florio takes credit were not the result of Florio's speech at the Council meeting but were rather the result of a labor grievance proceeding that Florio knew was already in progress at the time Florio took it upon himself to address these matters at the Council meeting.

ARGUMENT

I. SPEECH AT A CITY COUNCIL MEETING REGARDING ISSUES THAT ARE THE SUBJECT OF PENDING LABOR GRIEVANCE PROCEEDINGS BY A CITY EMPLOYEE INVOLVED IN THOSE GRIEVANCES IS NOT SPEECH ON A MATTER OF PUBLIC CONCERN WITHIN THE MEANING OF THIS COURT'S CASES.

"Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick v. Myers*, 461 U.S. 138, 147-48 (1983). "The inquiry into the protected status of speech is one of law, not fact." *Id.* at n.7.

In *Connick v. Meyers*, this Court held that most of the statements made by Myers did not constitute speech on a matter of public concern because

> Meyers did not seek to inform the public that the District Attorney's Office was *not discharging its governmental responsibilities* in the investigation and prosecution of criminal cases. Nor did Meyers seek to bring to light *actual or potential wrongdoing or breach of public trust* on the part of Connick and others. Indeed, the questionnaire, if released to the public, would convey no information at all other than the fact that a single employee is upset with the status quo. While discipline and morale in the workplace are related to an agency's efficient performance of its duties, *the focus of Myers' questions is not to evaluate the performance of the office but rather to gather information for another round of controversy with her superiors. These questions reflect one*

> *employee's dissatisfaction* with a transfer and *an attempt to turn that displeasure into a cause celebre.*

461 U.S. at 148 (emphasis added).

The Court found that the question in Myers' questionnaire inquiring if assistant district attorneys "ever feel pressured to work in political campaigns on behalf of office supported candidates" did raise a matter of public concern because "official pressure upon employees to work for political candidates not of the worker's own choice constitutes a coercion of belief in violation of fundamental constitutional rights." 461 U.S. at 149. Once a court has determined that a public employee has spoken on a matter of public concern, it applies the balancing test of *Pickering v. Board of Education*, 391 U.S. 563 (1968). *United States v. National Treasury Employees Union*, 115 S.Ct. 1003, 1012-13 (1995). Accordingly, in *Connick*, the Court applied the *Pickering* balancing test to the question regarding pressure to work in political campaigns on behalf of office supported candidates; the Court concluded that "[t]he limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships." *Connick*, 461 U.S. at 154.

Petitioners' Petition for Writ of Certiorari is full of discussions of this Court's First Amendment jurisprudence in areas other than government employment. However, *Connick* recognized that "it would indeed be a Pyrrhic victory for the great principles of free expression if the [First] Amendment's safeguarding of a public

employee's right, as a citizen, to participate in discussions concerning public affairs were confused with the attempt to constitutionalize the employee grievance that we see presented here." 461 U.S. at 154. Moreover, "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering*, 391 U.S. at 568. "[T]he government as employer indeed has far broader powers than does the government as sovereign. . . . To begin with, even many of the most fundamental maxims of our First Amendment jurisprudence cannot reasonably be applied to speech by governmental employees." *Waters v. Churchill*, 114 S.Ct. 1878, 1886 (1994) (plurality opinion).

In the present case the Sixth Circuit Court of Appeals held that "Florio's speech did not implicate a matter of public concern, because it was confined to allegations of misspending and inefficiency in his work unit." (Petition for Writ of Certiorari, Appendix "C" at 1). The Sixth Circuit opinion relied primarily on two published Sixth Circuit decisions: *Barnes v. McDowell*, 848 F.2d 725 (6th Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989), and *Rahn v. Drake Center, Inc.*, 31 F.3d 407 (6th Cir. 1994). In *Barnes*, the Sixth Circuit held that a governmental employee's allegations of misspending were not entitled to First Amendment protection unless such allegations were linked to charges of corruption. (Petition for Writ of Certiorari, Appendix "C" at 4-5 (discussing *Barnes*)). In *Rahn*, the Sixth Circuit held that a governmental employee's press release alleging that "money was not being spent in a wise fashion, by itself, is insufficient to find that the press

release addressed a matter of public concern. . . . The focus of this comment is not on patient endangerment arising from the misapplication of tax dollars; rather, the focus is on the employees' discontent with new work rules which might lead to a patient endangerment situation. . . . Moreover, this is not a case where the public employee has 'uncovered' a fraud committed on the taxpayers." (Petition for Writ of Certiorari, Appendix "C" at 7 (quoting *Rahn*, 31 F.3d at 412-13)).

The Sixth Circuit opinion in the present case concluded that "Florio has failed to demonstrate that his comments fell within the perimeters of public concern that we have recognized in *Barnes* and in *Rahn*. Florio describes only waste and inefficiency, and not some more perilous or scurrilous flaw in a public agency's functioning." (Petition for Writ of Certiorari, Appendix "C" at 7-8).

The Sixth Circuit follows the D.C. Circuit's interpretation of *Connick* that " '*Connick* would stand for nothing' " if speech regarding " 'public monies and government efficiency' " could alone constitute speech on matters of public concern, since "those two arguments can be raised in connection with virtually any public employment matter. . . . " *Barnes*, 848 F.2d at 734 (citing and quoting from *Murray v. Gardner*, 741 F.2d 434 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1050 (1985)); *Rahn*, 31 F.3d at 412; Petition for Writ of Certiorari, Appendix "C" at 5).

The Sixth Circuit view is consistent with the decisions of this Court. In *Connick*, the Court held that several statements made by Meyers did not constitute speech on a matter of public concern because the statements did not

allege that "the District Attorneys' Office was not discharging its governmental responsibilities" and did not "seek to bring to light actual or potential wrongdoing" by other governmental employees. 461 U.S. at 148. The statements at issue in *Pickering* were "in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher." 391 U.S. at 569-70. Rather, "the letter constituted, basically, an attack on the School Board's handling of the 1961 bond issue proposals and its subsequent allocation of financial resources between the schools' educational and athletic programs." *Id.* at 566. In contrast to the fact situation in *Pickering*, the Sixth Circuit observed in the present case that "Florio's speech did not implicate a matter of public concern, because it was confined to allegations of misspending and inefficiency *in his work unit.*" (Petition for Writ of Certiorari, Appendix "C" at 1 (emphasis added)). Moreover, as elaborated in the Statement of the Case, *supra*, Florio's statements in the City Council meeting involved matters that were the subject of pending and scheduled labor negotiations regarding employee grievances. Under such circumstances, Florio's remarks certainly did not constitute speech on a matter of public concern.

II. NO CONFLICT AMONG THE CIRCUITS EXISTS WITH REGARD TO THE TYPE OF FACT SITUATION INVOLVED IN THE PRESENT CASE.

Petitioners' Petition for Writ of Certiorari suggests that a conflict exists among the circuits with regard to what constitutes speech on a matter of public concern. Assuming, *arguendo*, that any such conflict exists, this

case is not the appropriate case to resolve such conflict because the circuits would not necessarily disagree on whether Florio's speech addresses a matter of public concern. None of the cases cited by petitioners held that a fact situation involving only allegations of misspending or inefficiency in the governmental employee's own working unit, without any linkage to allegations of corruption, wrongdoing, or criminal conduct, constituted speech on a matter of public concern. Indeed, the case upon which petitioners mainly rely involved accusations that other employees had made false reports amounting to fraud as well as speech involving county issues having nothing to do with the employee's work situation. *Czurlanis v. Albanese*, 721 F.2d 98, 100, 101 (3d Cir. 1983). Furthermore, only one of the cases cited by petitioners involved speech relating to collective bargaining negotiations, and that case held that such speech was *not* speech on a matter of public concern. *Edmundson v. Borough of Kennett Square*, 881 F. Supp. 188, 195 (E.D. Pa. 1995).

Accordingly, no conflict among the circuits exists with regard to the type of fact situation involved in the present case.

CONCLUSION

As demonstrated above, the holding of the Sixth Circuit Court of Appeals in the present case is consistent with the decisions of this Court as well as the decisions of other circuits. Therefore, respondents respectfully request that the Court deny the Petition for Writ of Certiorari submitted by petitioner.

Respectfully submitted,

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